86 1790

No. _____

Supreme Court, U.S.
FILED
MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK E. FLEMING,

Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

CASE NO. 86-1040

PETITION FOR A WRIT OF CERTIORARI

Submitted by:

Jack E. Fleming
3624 Citadel Drive North,
Suite 250
Colo. Spgs., Colo. 80909
(303) 597-1971

Petitioner - Pro se.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the respondent abused its discretion pursuant to 26 USCA 7805(a) and (b) resulting in prejudicial discrimination to the petitioner by forcing the petitioner to go to U.S. Tax Court over the deductibility of a partnership loss, and therefore, caused the petitioner "inordinate expense and loss of time" and also resulted in the "inequality" of treatment between two very similarily situated taxpayers because this same partnership loss was allowed in full for the same tax year from the very outset and has continued to be allowed to the only other partner in the partnership by the respondent without any question.

2. Whether the respondent abused its discretion pursuant to 26 USCA 7805(a) and (b) resulting in prejudicial discrimination to the petitioner by forcing the petitioner to go to U.S. Tax Court over the amount of deduction of an investment tax credit, and there-

fore, caused the petitioner "inordinate expense and loss of time" and also resulted in the "inequality" of treatment between two very similarily situated taxpayers because the other partner taxpayer was never required to go to U.S. Tax Court to settle the dispute, and therefore, never suffered the loss of time and expense, but yet was allowed the results of the Tax Court decision.

3. Whether the U.S. Tax Court erred and/or abused its discretion pursuant to Tax Court Rule 142(a) and 28 USCA by not allowing the petitioner to introduce into evidence his Exhibit 8 during the course of the trial of this matter that petitioner felt was competent and relevant evidence to the issues on trial and the judicial proceeding itself.

4. Whether the Tax Court erred and/or abused its discretion in not granting petitioner's motion during the trial for the disallowance of all the testimony, evidence and exhibits of the respondent's expert witness for fail-

ure to comply with Tax Court Rule 71(d), and the Tax Court's own instruction issued February 24, 1984, namely, Instruction 5(d).

5. Whether the Tax Court erred and/or abused its discretion when it did not declare the respondent in default or dismiss the case pursuant to Tax Court Rule 123 for failure of the respondent to comply with the Tax Court's rules and procedures, namely, Rules 71(d), 72(a)(b), 142(a), 143 and the Court's own Instruction 5(d).

6. Whether the respondent erred when it did not attempt to secure the documents they felt necessary to satisfy the respondent's requirements for production of documents in the discovery phase prior to trial pursuant to Tax Court Rule 72(a)(b), and therefore, satisfy the respondent's requirements for documents for petitioner's claimed deduction for the partnership loss of $12,431.50.

7. Whether the U. S. Court of Appeals erred and/or abused its discretion by ruling from

petitioner's memorandum brief submitted in response to the U. S. Court of Appeals request for briefs to support oral argument pursuant to FRAP Rule 34(a) without forewarning the petitioner, who is pro se, that the Court can and/or may rule from the memorandum briefs as submitted and without the petitioner being allowed to submit formal briefs for consideration pursuant to FRAP Rule 28 without denying petitioner due process of law.

8. Whether the Tax Court has the authority, expertise and discretion to prepare its own determination of the value of the petitioner's investment tax credit deduction without it being an expert in the field or consulting with an expert in the construction field to arrive at the conclusion it did in its opinion regarding that item.

9. Whether the respondent met the burden of proof in the presentation of their case that would allow them to increase petitioner's deficiency in the petitioner's investment

tax credit item pursuant to Tax Court Rule 142(a).

10. Whether the respondent met the burden of proof in the presentation of their case that would allow them to increase petitioner's deficiency in regards to the petitioner's partnership loss of $12,431.50 pursuant to Tax Court Rule 142(a).

11. Whether the petitioner was denied due process of law because of errors and/or abuses of discretion by the U.S. Tax Court during the trial of these matters.

12. Whether the petitioner was denied due process of law because of errors and/or abuses of discretion by the U. S. Court of Appeals in its review of the decisions and actions of the Tax Court in these matters.

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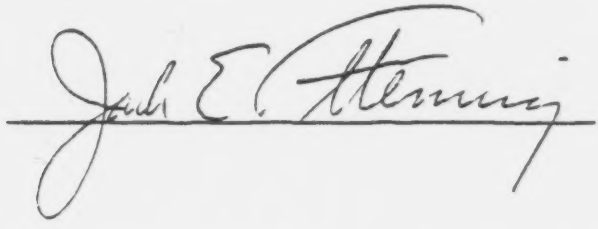
WAGNER V. UNITED STATES 387 F2d 966, 972	App. 10, 18, 20
UNION EQUITY V. COMMISSIONER 481 F2d 812, 817	11, App. 10, 18, 21
ALAMO NATIONAL V. COMMISSIONER 95 F2d 622	10, 11, App. 21, 22
MASSAGLIA V. COMMISSIONER 286 F2d 250	11, App. 21

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the Petitioner's Petition For Writ Of Certiorari including all exhibits, postage pre-paid, this 30th day of April, 1987 to:

Mr. Lawrence B. Gibbs
Commissioner of Internal Revenue
1111 Constitution Avenue, N. W.
Washington, D. C. 20224



CITATION OF OPINIONS OF COURTS BELOW

Opinions from lower courts are cited below:

Jack E. Fleming and Carolyn D. Fleming v. Commissioner Internal Revenue Service, United States Tax Court, 25460-82

Jack E. Fleming and Carolyn D. Fleming v. Commissioner of Internal Revenue Service, U. S. Court of Appeals for the Tenth Circuit filed January 5, 1987. 86-1040

Jack E. Fleming and Carolyn D. Fleming v. Commissioner of Internal Revenue Service, U. S. Court of Appeals for the Tenth Circuit filed February 10, 1987. 86-1040

JURISDICTION

1. The Petitioner asserts jurisdiction under 28 USCA 1254 from the jurisdiction granted to the U. S. Court of Appeals pursuant to 26 USCA 7482. The U. S. Court of Appeals for the Tenth Circuit took its final action on February 10, 1987 wherein a Petition For Rehearing pursuant to FRAP Rule 40 was denied on its merits.

2. There are no orders for a rehearing.

3. There has been no cross-petition for writ of certiorari under Rule 19.5 to date.

CONSTITUTIONAL PROVISIONS

U. S. Tax Court Rules

Federal Rules of Appellate Procedure for the United States Court of Appeals.

Rules of Court for the United States Court of Appeals for the Tenth Circuit as amended July 21, 1985.

Due Process of Law - 5th and 14th Amendments to the United States Constitution.

Equal Protection Under The Law - United States Constitution.

TABLE OF STATUTES

Statute	Page
U. S. Tax Court Instructions dated February 24, 1984, Inst. 5(d) and 6.	i(b), 6 App. 24, 25
U. S. Tax Court Rules 71(d), 72(a)(b), 123, 142, and 143.	i(a), i(b), i(d) App. 9, 24, 25
Federal Rules of Appellate Procedure for the U. S. Court of Appeals. 34(a), 28 and 40.	i(a), i(c), 6, 7, 8, App. 8, 14, 15, 26
Rules of Court for the U. S. Court of Appeals for the Tenth Circuit as amended July 21, 1985, 9(e).	6, App. 8, 14
26 USCA 7805 (a) and (b).	i, 5, 8
28 USCA	i(a)
United States Constitution, 5th and 14th Amendments.	App. 15, 17, 18, 26

STATEMENT OF THE CASE

JACK E. FLEMING (hereinafter referred to as "Petitioner") filed his 1979 federal income tax return in 1980. Included in that return were two claimed deductions from a real estate investment that was constructed in 1979 by the Petitioner and his only partner. This investment was owned by the Petitioner and his partner in a general partnership known as F & S Warehouse. Each partner had a 50% interest in the project.

Sometime later, the Respondent contacted the Petitioner for an audit of his 1979 return. The Petitioner complied with that request, and met with the Respondent to prove the deductions in question. After the audit, the Respondent proceeded to disallow one of the Petitioner's claimed deductions of a partnership loss in the amount of $12,431.50 that was totally allowed by the Petitioner's partner. The Respondent to date has never challenged the partner's partnership loss for $12,431.50. This part-

icular deduction was not even challenged at my audit with the Respondent, but was disallowed by the Respondent when it issued its Notice of Deficiency for that audit. This disallowance of the Petitioner's partnership deduction without the opportunity to prove the validity of that deduction amounts to denial of due process of law and denial of equal protection under the law. The Respondent also disallowed the Petitioner's deduction for a claimed investment tax credit on the same real estate investment when it issued its Notice of Deficiency. Again, that particular deduction had not been challenged by the Respondent at the audit, and therefore, was disallowed by the Respondent and again denied the Petitioner his constitutional rights. The Petitioner communicated with the Respondent off and on for the next several months trying to resolve his alleged deficiency. The Respondent refused to see and/or agree with the Petitioner on these two claimed

deductions, so it was then decided by the Respondent that these two issues would have to be settled in the U. S. Tax Court. The Petitioner went to Tax Court in 1984, and his claimed deduction for the partnership loss of $12,431.50 was disallowed in its entirety for lack of substantiation while the Petitioner's partner, who never had to go to Tax Court was allowed to claim his deduction for his partnership loss in full. The Tax Court then decided on its own the Petitioner's claimed investment tax credit should be cut in half from what was claimed by the Petitioner and his partner. Again, the Petitioner's partner did not have to go to Tax Court, but was the benificiary of the Tax Court decision. The Petitioner feels that the Respondent grossly abused its discretion pursuant to 26 USCA 7805 (a) and (b) by forcing the Petitioner to go to Tax Court and not involving the Petitioner's partner to resolve the same issues that had evolved from the same real estate investment owned by both the Pet-

itioner and his partner. This conduct engaged in by the Respondent resulted in the Petitioner incurring "inordinate expense and loss of time" and also resulted in "inequality" of treatment between two identically situated taxpayers because they were both partners in the same venture.

During the Tax Court trial, the Tax Court erred and/or abused its discretion in several instances by not following the U. S. Tax Court Rules, and therefore, arriving at opinions that were contrary to the testimony, evidence and some objections made by the Petitioner made during the course of the trial.

The U. S. Court of Appeals, 10th Cir. reviewed the U. S. Tax Court decision pursuant to an appeal filed with the Court in 1986. The Petitioner feels that the U. S. Court of Appeals erred and/or abused its discretion by ruling summarily pursuant to Rule of Court 9(e) from the Petitioner's one memorandum brief submitted pursuant to FRAP Rule 34(a) without forewarning the

Petitioner that the Court could rule pursuant to that rule at its own option, therefore, precluding the Petitioner from submitting briefs pursuant to FRAP Rule 28. The Petitioner was not allowed to file his briefs pursuant to FRAP Rule 28, and the appeal was decided on what was contained in the Petitioner's memorandum brief. Because the U. S. Court of Appeals ruled from the Petitioner's memorandum brief, which was not prepared in detail because the Petitioner never felt that oral argument was necessary, the Petitioner's one brief was not as comprehensive and detailed as he had planned had he been allowed to file briefs pursuant to FRAP Rule 28. The U. S. Court of Appeals failed to detect and/or acknowledge the numerous errors of the U. S. Tax Court because the one brief was not prepared as the only brief that the Petitioner could file in his appeal.

On January 5, 1987, the U. S. Court of Appeals issued its opinion. The Petitioner did not feel that the opinion was correct

in relation to the facts and evidence presented in this case. The Petitioner then filed with the Court on January 14, 1987 his petition for rehearing pursuant to FRAP Rule 40. The Court issued its final order on February 10, 1987 denying the Petitioner's petition for rehearing on the merits.

REASONS FOR GRANTING WRIT

The United States Supreme Court must grant this Writ because the Petitioner's constitutional rights have been violated, namely, denial of due process of law and denail of equal protection under the law. The Interal Revenue Service also discriminated against the Petitioner pursuant to 26 USCA 7805 (a) and (b) in several instances, and therefore, treated one taxpayer much differently than another taxpayer when both taxpayers were in identical taxpaying situations. The Petitioner was forced to go to Tax Court over a claimed deduction that was allowed to the Petitioner's part-

ner from the very beginning, and therefore, he never had to go to Tax Court over the validity of that deduction. The Respondent had first hand knowledge at the same time that both of the identically situated taxpayers had claimed the same deductions that were disallowed to the Petitioner, but were allowed to the Petitioner's partner. Also, the Petitioner was the only one of the two identically situated taxpayers that was forced to go to Tax Court over the validity of the investment tax credit deduction that had been taken as a deduction by the two taxpayers at the same time. All of the income tax information concerning the questioned real estate investment had been prepared by the same CPA for the partnership, and this same information was used on both of the taxpayers returns for 1979.

The U. S. Tax Court did not comply with the rules of the U. S. Court in several instances. The Tax Court made a very critical error in not allowing the Petitioner to introduce into evidence during the trial

an exhibit that was meant to show the Court that the Petitioner had been discriminated against in his dealings with the Respondent. The Tax Court erred when it also allowed into evidence during the trial the testmony and exhibits of the Respondent that should have been disallowed pursuant to the Tax Court rules. The whole case of the Respondent should have been dismissed pursuant to the Tax Court Rules.

The U. S. Court of Appeals did not detect or recognize the errors of the Tax Court in its review, therefore, committed errors of its own in its review of this case. The case law cited by the U. S. Court of Appeals did not apply to two or more identically situated taxpayers involved in the same identical tax question. There are some citations from applicable legal authorities that help point out how the Courts in the past have ruled on such issues. In Alamo National Bank v. Commissioner 95 F2d 622 (5th Cir. 1938), the Court ruled as follows:

> Equitable considerations cannot overide the provisions of the tax statutes, nor always supply their ommissions, but equitable principles have a place in weighing the matters of honesty, good faith, and consistency in tax accounting.
>
> The continuity in income taxation which sometimes requires a projection of that which is done in one tax year into another where the same facts must govern dictates that there should likewise be consistency in treatment.

In Massaglia v. Commissioner 286 F2d 250 (10th Cir. 1961), the Court ruled as follows:

> Principles of estoppel will be applied with circumspection to conduct of government operations, but government will not be allowed to deal dishonorably or capriciously with its citizens.

In Union Equity v. Commissioner 481 F2d 812, 817 (Ct. Cl. 1967), the Court ruled as follows:

> It is true that the doctrine of consistency or quasi-estoppel has on occasion been applied to prevent an injustice, but such has been done generally where there has been fraud or unfair conduct on the part of the Commissioner, with some degree of reliance thereon by the taxpayer to the latter's detriment.

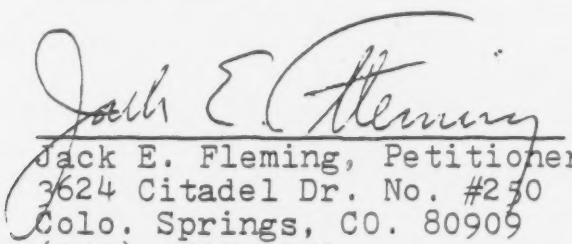
To prevent a continuing denial of the rights and priviledges of the Petitioner in this case, the United States Supreme Court

must grant this petition for a writ of certiorari for all of the reasons stated above.

CONCLUSION

Wherefore, the Petitioner respectfully requests that this Court grant this petition for a writ of certiorari for the foregoing reasons so this matter can be reviewed by the only Court in the United States with jurisdiction left to do so.

Respectfully submitted,



Jack E. Fleming, Petitioner
3624 Citadel Dr. No. #250
Colo. Springs, CO. 80909
(303) 597-1971

Petitioner - Pro se.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

March 26, 1986

Howard K. Phillips
Clerk

Telephone
(303) 844-3157
(FTS) 564-3157

Mr. Jack E. Fleming
3624 Citadel Drive North, Suite 250
Colorado Springs, Colorado 80909

Re: 86-1040; Fleming v. Commissiomer of Internal Revenue

Dear Mr. Fleming:

This Court has today assigned the captioned case to Calendar C, pursuant to Tenth Circuit Rule 10, as revised on March 12, 1980. From a preliminary review, it appears that the case may be appropriate for disposition without oral argument.

The parties may simultaneously submit briefs, in memorandum form, in support of their respective positions. These memoranda may consist of a short statement explaining why the judgment of the district court should

be reversed or affirmed, together with citations to relevant legal authorities.

The parties may also include in their memoranda a statement setting forth reasons why, in their opinion, oral argument should be heard. The parties' memoranda and the trial court record will be reviewed by a panel of three judges who will determine whether oral argument is needed. If the panel unanimously is of the opinion that oral argument is not needed, the case will be submitted for determination without oral argument.

An original and three copies of the memoranda should be filed within fifteen (15) days from the date of this letter. These memoranda must be served on opposing parties at the time of filing and proof of service must be forwarded to the court. Formal briefs need not be filed until further notice from the court.

Sincerely yours,

HOWARD K. PHILLIPS, CLERK

By /s/ Lipen Balzano
Deputy Clerk

HKP/lwb

cc: Marlene Gross, Acting Director, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Ave., N.W., Washington, D. C. 20224.

Roger M. Olsen, Acting Assistant Attorney General, Michael L. Paup, Chief, Appellate Section, U.S. Department of Justice, Tax Division, Washington, D. C. 20530

L-7(d) 10/84

APPENDIX B

3624 Citadel Drive North, Suite250
Colorado Springs, Colorado 80900

November 18, 1986

Mr. Robert L. Hoecker
Clerk of the Court
United States Court of Appeals
C 404 United States Courthouse
Denver, Colorado 80294

Reference: 86-1040: Fleming v. Commissioner of Internal Revenue.

Dear Mr. Hoecker:

I received from this Court on March 26, 1986 a letter asking for memo briefs to be filed prior to the formal briefs in this case. See Copy of letter attached. I filed a memo brief with the Court on April 2, 1986 and the Internal Revenue filed their brief on April 24, 1986. To date, I have not heard anything else from the Court in regard to the filing of formal brief. What is the reason that the Court has not requested formal briefs in this case?

Please look into this situation and let me know what the status of this case is at this time. I am willing to waive

oral arguments in this case so the case can proceed with the filing of formal briefs.

Sincerely yours,

/s/ Jack E. Fleming
Jack E. Fleming
597-1971

JEF/jef

Enclosures: (1)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT
CLERK OF THE COURT

C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

November 26, 1986

ROBERT L. HOECKER
Clerk

TELEPHONE
(303) 844-3157
(FTS) 564-3157

Jack E. Fleming
3624 Citadel Drive North
Suite 250
Colorado Springs, CO 80909

RE: No. 86-1040: Fleming, vs. Comm. Internal Revenue

Dear Mr. Fleming:

With reference tc your letter of November 18, 1986, the Court has the captioned case under consideration and you will be notified of any decision.

Sincerely,

ROBERT L. HOECKER, Clerk

By /s/ Janet Gregor
Deputy Clerk

RLH/jg

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURT HOUSE
DENVER, COLORADO 80294

January 5, 1987

ROBERT L. HOECKER
Clerk

TELEPHONE
(303) 844-3187
(FTS) 564-3187

Mr. Jack E. Fleming
3624 Citadel Drive North, Suite 250
Colorado Springs, Colorado 80909

Re: No. 86-1040: Fleming vs. Comm. Internal Revenue

Dear Mr. Fleming:

Enclosed is a copy of the order and judgment of the court in the captioned cause.

Sincerely yours,

/s/ Robert L. Hoecker
ROVERT L. HOECKER, Clerk

RLH/jg
Enclosure

cc: Mr. Robert P. Ruwe, Director, Internal Revenue Service, 1111 Constitution Ave., N.W., Washington, D. C. 20224
Mr. Roger M. Olsen, Mr. Michael L. Paup, Mr. David English Carmack, Mr. Matthew J. Anderton, U.S, Department of Justice, Tax Div. P. O. Box 502, Wash., D.C. 20530

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACK EUGENE FLEMING Petitioner-Appellant, CAROLYN D. FLEMING, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE Respondent-Appellee.	No. 86-1040 (T.C. No. 25460-82) (U.S. Tax Court)

ORDER AND JUDGMENT

Before LOGAN and MOORE, Circuit Judges, and ROGERS, District Judge*

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*The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

Petitioner appeals from the Tax Court's

decision upholding in part respondent's determination of deficiency with respect to his 1979 income taxes.

Petitioner challenges three aspects of the Tax Court's decision. First, the Tax Court sustained respondent's disallowance of petitioner's claim for a deduction for legal expenses. On appeal, petitioner argues that respondent knew the purpose of petitioner's legal expenses before trial. Although petitioner had the burden of proof, he introduced no evidence as to legal expenses at trial. Therefore, the Tax Court's decision on this issue was correct. See Rule 142(a) of the Rules of Practice and Procedure of the United States Tax Court (Tax Court Rules).

Second, the Tax Court sustained respondent's disallowance of petitioner's deduction for a partnership loss. We agree with the Tax Court that petitioner had not introduced sufficient evidence to substantiate the loss. On appeal, petitioner ar-

gues that the Tax Court erred in excluding Exhibit 8, a deficiency notice received by his partner. Petitioner wanted to show that respondent had allowed petitioner's partner to take a deduction for the partnership loss (Vol. II at 98-101). Respondent can challenge a deduction taken by one taxpayer even if he does not challenge all taxpayers who take that deduction. See Wagner v. United States, 387 F.2d 966, 972 (Ct. Cl. 1967); cf. Union Equity Cooperative Exchange v. Commissioner, 481 F.2d 812, 817 (10th Cir.), cert. denied, 414 U.S. 1028 (1973). The Tax Court correctly excluded the deficiency notice.

Third, the Tax Court allowed petitioner an investment credit for costs incurred in constructing a moveable partition system. The credit was smaller than petitioner had claimed on his return and larger than the amount proposed by respondent. On appeal, petitioner argues that the Tax Court had "no sound theory" for its determination of

the costs. We agree with the Tax Court that all of the cost estimates presented by the parties were flawed. The Tax Court's determination of the costs is supported by the record and petitioner's conclusory assertions on appeal fail to cast any doubt on its accuracy.

Petitioner also complains that the testimony respondent's expert witness gave at trial regarding the cost of the partitions differed from the estimate that same expert had presented before trial. When petitioner raised this issue at trial, the judge concluded that the changes were in petitioner's favor (Vol. II at 162-172). We agree. Therefore, admission of the expert's testimony was, at most, harmless error. See Tax Court Rule 160.

For the reasons stated above and the reasons stated in the Tax Court's Memorandum Findings of Fact and Opinion, the decision of the United States Tax Court is AFFIRMED. See 10th Cir. R. 17(b).

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK EUGENE FLEMING,	)	
	)	
Petitioner-Appellant,	)	
	)	
CAROLYN DELL FLEMING,	)	
	)	
Petitioner,	)	No. 86-1040
	)	(T.C. No.
v.	)	25460-82)
	)	(U.S. Tax
COMMISSIONER OF INTERNAL REVENUE	)	COURT)
	)	
Respondent-Appellee.	)	

PETITION FOR REHEARING PURSUANT TO FRAP RULE 40

Appeal From The United States Tax Court
The Honorable Stephen J. Swift, Presiding

Submitted by:

Jack E. Fleming, Appellant
3624 Citadel Drive North, Suite 250
Colorado Springs, Colorado 80909
(303) 597-1971

Appellant JACK E. FLEMING, in his Petition for Rehearing pursuant to FARP Rule 40, states as follows:

The Appellant did submit a brief to this Court pursuant to this Court's letter to the Appellant dated March 26, 1986 asking for briefs to determine whether or not oral argument would be necessary in this appeal. At no time did this Court indicate to the Appellant that it might rule on this appeal based solely on the briefs received pursuant to its letter of March 26, 1986 and pursuant to FRAP Rule 34(a). The Apellant has been denied due process of law when this Court ruled according to 10th Cir. Rule 9(e) without warning the Appellant beforehand. The Appellant was under the belief that he would be able to submit an opening brief and a reply brief to the Court pursuant to the Court's letter dated March 26, 1986 and pursuant to FRAP Rule 28. Please see the last full sentence in that letter which reads as follows:

> An original and three copies of the memoranda should be filed within fifteen (15) days from the date of this letter. These memoranda must be served on opposing parties at the time of filing and proof of service must be forwarded to the court. Formal briefs need not be filed until further notice from the court.

The Appellant did not prepare his memoranda brief pursuant to FRAP Rule 34(a) as his one and only brief to be submitted in this appeal. Appellant never felt that oral argument was necessary in this appeal, and therefore, never prepared his brief (memoranda) for that purpose, but instead was preparing to state his arguments in the formal briefs. The Appellant was mislead by the Court, and the Court's decision based upon their actions in this appeal, is a complete denial of due process of law. The Appellant should have been informed that the possibility existed that this Court might rule on the memoranda briefs submitted and formal briefs would not be requested. The Appellant wrote a letter to the Court on November 18, 1986 asking the Court when it would be time to file formal

briefs. The Appellant stated he was willing to waive oral argument in this appeal so the appeal could proceed with the filing of formal briefs. The Appellant fully expecting that he would file a formal opening brief and reply brief in this appeal.

In the second part of the Court's opinion regarding petitioner's deduction for a partnership loss, the Court agreed with the Tax Court that petitioner had not introduced sufficient evidence to subordinate loss. During the trial, the petitioner did introduce into evidence all of the business records of the partnership that did pertain to the loss through CPA Larry Lowry, who had prepared the business records and the amount of the partnership loss from the files of the partnership. Judge Swift did state that the business records of the partnership were records that were acceptable as evidence to determine the validity of the loss. Mr. Lowry did state under oath that he had prepared these records from the files of the partnership. The Tax Court did error

when it denied the admission of petitioner's exhibit 8 in the trial. Disallowing the admission of exhibit 8 was a denial of due process of law and violated the doctrines of equity and equal protection under the law. For the tax year of 1979, both petitioner and partner were served with Notices of Deficiency in their taxes for that year. The partner's notice did not include a challenge of the partnership loss, therefore, it was allowed in full by the respondent. The petitioner's notice did challenge the partnership loss, and the petitioner did provide all of the records available through CPA Lowry to the respondent. The respondent did communicate with CPA Lowry on several occasions regarding this loss and gave them all of the materail that he had regarding the loss. The respondent, for whatever reason, still disallowed the partnership loss for the petitioner, but did allow that very same loss in the same amount of money for the partner in the same

tax year. The petitioner was then forced to go to Tax Court because he could not resolve this deduction with the respondent. At this point, this shows that the respondent did in fact discriminate against the petitioner, and not against the partner. It makes no sense that under the doctrines of equity, due process of law and equal protection under the law that the respondent could justify allowing the deduction to the partner and not the petitioner. It would only seem fair that the respondent should have challenged the partner's partnership loss if it was going to challenge the partnership loss of the petitioner all the way to Tax Court. Neither of the cases quoted by this Court, namely, Wagner v. U.S. 387 F2d 966, 972 and Union Equity v. Commissioner 481 F2d 812, 817 support the theory that this Court uses in this case to support its opinion. In Wagner v. U.S. supra, the Court stated as follows:

The Commissioner's failure to assess

> deficiencies against some taxpayers who owe additional tax does not preclude him from assessing deficiencies against other taxpayers who admittedly owe additional taxes on the same type of income.

This statement does not pertain to this case, and the Commissioner did discriminate against the petitioner when he denied the petitioner's partnership loss back in the Notice of Deficiency stage and allowed that same deduction for the partner. Both the partner and the petitioner did claim the deduction on their 1979 tax return, therefore, admitting to the Commissioner that both parties had taken the deduction. Allowing an identical and admitted deduction for the partner and disallowing the same for the petitioner is dsicrimination. The tax returns for the tax year of 1979 of both the partner and the petitioner wer audited by the Commissioner, and therefore, the Commissioner had knowledge of both of these deductions at about the same time. The point here is that both the partner and the petitioner took the partnership loss for 1979

and admitted its existence to the Commissioner. When the audit was performed by the Commissioner, the Commissioner had first hand knowledge of the loss on each return. One was allowed and one was not, therefore, the Commissioner committed discrimination against the petitioner.

In Wagner v. U.S. supra, the Court did state in its opinion as follows:

> Nor did discrimination result from the circumstance that other persons who had made similiar designations may have never paid a gift tax either because they never thought to file a gift tax return (and the Service never learned of the matter) or because the Service never sought to concentrate its collection efforts on those types of transfers. It is inherent in any voluntary system of taxation that there will be those, who knowingly or not, fail to file the required tax returns. The fact that all taxpayers or all areas of the tax law cannot be dealt with by the Internal Revenue Service with equal vigor and that there may be some taxpayers who avoid paying the tax cannot serve to release all other taxpayers from their obligation.

The petitioner's point here is that the Service was aware of the loss for both the partner and the petitioner and did not need to concentrate its efforts in its col-

lection efforts because it already had knowledge of the deduction taken by the partner and the petitioner.

In Union Equity v. Commissioner supra, the Court quoted from Massaglia v. Commissioner 286 F2d 250 (10th Cir. 1961) as follows:

> The very nature of government operations requires us to apply the principles of estoppel to its conduct with circumspection. At the same time, we will not allow the government to deal dishonorably or capriously with its citizens. It must not play an ignoble part or do a shabby thing.

The Court in Union Equity v. Commissioner supra also quoted from Alamo National Bank v. Commissioner 95 F2d 622 (5th Cir.) as follows:

> The right and wrong of things and equitable principles have a place in tax matters.

It is the petitioner's contention that the Commissioner cannot disallow an admitted partnership loss for the petitioner and then not disallow that same admitted loss for the partner in the same tax year and for the same amount of money without having

committed discrimination against the petitioner. It is not an equitable principle to disallow the same loss from the petitioner's return that has been accepted by the Service in the partner's return. The Tax Court erred by not allowing the admission of petitioner's exhibit 8, and this Court has erred by not correcting Tax Court's error. The Commissioner must abide by the rules of fair play and equitable principles in dealing with taxpayers as outlined in Alamo National Bank v. Commissioner supra.

The third part of the Court's opinion in this appeal dealt with the petitioner's investment tax credit for costs incurred in construction of a moveable partition system. This Court agreed with the Tax Court's determination taht all cost estimates presented by all parties were flawed. This Court then goes onto say without detail quoted in its opinion that the Tax Court's determination of the cost is supported by the record, and petitioner's con-

clusory assertions on appeal fail to cast any doubt on its accuracy. This Court fails to detail the reasons or evidence that led it to that conclusion.

The petitioner feels that the Tax Court erred when it made its determination in favor of the respondent based on a flawed cost estimate . If the cost estimate of the respondent is flawed, how does this Court come to the conclusion that the respondent's flawed estimate is supported by the record? How does this Court come to the conclusion that the flawed estimate of the petitioner fails to cast any doubt on the accuracy of the respondent's flawed estimate?

Petitioner did complain that the testimony of the respondent's expert witness at trial regarding the cost of the partitions differed from the estimate the same expert had presented to the Court before the trial according to the Tax Court's instructions. The Tax Court concluded that the changes in the testimony of the respondent's expert were in the favor of the

petitioner and this Court agreed with that statement. First of all, the respondent's expert was required to present its report and testify according to Tax Court Rule 71(d). Respondent's expert did not and both the Tax Court and this Court acknowledged that. All parties are expected to obey the Tax Court Rules in order to resolve their disputes. If any party fails to obey the Court's rules or comply with its procedures, that party may be declared in default, and a decision may be entered against that party. Tax Court Rule 123.

The petitioner received a copy of the Tax Court's requests and instructions in this case dated February 24, 1984 for the Court session of March 12, 1984. The respondent did not comply with Part 5(d) of those instructions. Tax Court erred when it did not exclude the testimony of the respondent's expert for failure to comply with Tax Court Rules 71(d) and instructions 5(d).

The petitioner was prepared on the day

of the trial to question the respondent's expert based on his report submitted to the Court and the petitioner prior to the trial. When the respondent's expert did not testify according to the submitted report, the petitioner was not prepared because the respondent had violated Tax Court Rules 71(d) and 123. The petitioner did properly object to the Court regarding these violations and asked that the respondent's expert be excluded from further testifying and that his testimony already given be stricken from the record. The Court denied that objection. The Tax Court erred when it denied that objection. The Court could have moved pursuant to Part 6 of its instructions dated February 24, 1984, but it did not. The Court erred when it did not dismiss this case based on the default of the respondent. This Court erred when it called the violations and errors of the Tax Court harmless error. It is the petitioner's contention that violation of court rules and procedures

is not harmless error, but a denial of due process of law.

WHEREFORE, the Appellant feels that this Court has erred in its opinion regarding the Tax Court's opinion submitted by Judge Swift in this case. The Appellant also feels he was denied due process of law in several instances in the Tax Court case and also in the appellate procedure applied by this Court in this appeal. Therefore, the Appellant requests that this Court grant this petition for rehearing pursuant to FRAP Rule 40. It is the request of the Appellant that the case against the petitioner by the respondent and before this Court be dismissed because of the respondent's violation of court procedure, court rules, due process of law and errors committed by the Courts in this case, and that the petitioner's 1979 federal income tax return be accepted by the respondent as filed.

Respectfully submitted,

/s/ Jack E. Fleming
Jack E. Fleming, Petitioner-Appellant
3624 Citadel Dr. No. #250
Colo. Spgs., Colo. 80909
(303) 597-1971

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the Appellant's Petition for Rehearing Pursuant to FRAP Rule 40, postage pre-paid, this 14th day of January, 1987 to:

Mr. Robert P. Ruwe
Director Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D. C. 20224

Mr. Roger M. Olsen
Mr. Michael L. Paup
Mr. David English Carmack
Mr. Matthew J. Anderson
U. S. Department of Justice Tax Div.
Washington, D. C. 20530

/s/ Jack E. Fleming

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

February 10, 1987

ROBERT L. HOECKER
Clerk

TELEPHONE
(303) 844-3157
(FTS) 564-3157

Mr. Jack E. Fleming
3624 Citadel Drive North, Suite 250
Colorado Springs, Colorado 80909

Re: 86-1040: Fleming v. Commissioner
Internal Revenue

Dear Mr. Fleming:

Enclosed is a copy of an order entered today in the captioned appeal.

Very truly yours,

ROBERT L. HOECKER, Clerk

By /s/ Lipen Balzano
Deputy Clerk

RLH/lwb
Enclosure
cc: Mr. Robert P. Ruwe, Director, Internal Revenue Service, 1111 Constitution Ave., N.W., Washington, D. C. 20224
Mr. Roger M. Olsen, Mr. Michael L. Paup, Mr. David English Carmack, Mr. Matthew J. Anderson, U.S. Department of Justice, Tax Division, P.O. Box 502, Wash, D. C. 20530

JANUARY TERM - FEBRUARY 10, 1987

Before Honorable James K. Logan and Honorable John P. Moore, Circuit Judges, United States Court of Appeals, and Honorable Richard D. Rogers, District Judge, United States District Court for the District of Kansas*

JACK EUGENE FLEMING,	)	
	)	
Petitioner-Appellant,	)	
	)	
CAROLYN DELL FLEMING,	)	
	)	
Petitioner,	)	
	)	No. 86-
v.	)	1040
	)	
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
Respondent-Appellee.	)	

This matter, is before the court on appellant's petition for rehearing, which we construe as a motion to recall the mandate and for reconsideration of our order and judgment.

In addition to renewing some of his arguments on the merits, appellant suggests that he was denied due process because the court decided his appeal after receiving a memorandum brief from each party. The materials submitted by appellant have been

reviewed by the members of the hearing panel, conclude that the original disposition was correct and did not violate due process. See former 10th Cir. R. 10(d), superseded by 10th Cir. R. 27.1.2(c). Accordingly, the motion is denied on the merits.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

*The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.